IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

78-1899 NO ____

FRAUD AND DECEIT ACTION

LOWER COURT, C.A. 275,1976
TRIAL COURT, C.A. 868,1976

PETITION FOR WRIT OF CERTIORARI

RICHARD F. DEMOSS AND
WILLIAM J. BARRENTINE
JOINT TENANTS OR SURVIVOR
2515 DEEPWOOD DRIVE
WILMINGTON, DELAWARE
19810

PETITIONERS

v.

INDIAN HEAD, INC., et al.
C/O MORRIS, NICHOL, ARST & TUNNELL
WALTER L. PEPPERMAN, II
ATTORNEYS FOR RESPONDENTS

12TH & MARKET STREETS
WILMINGTON, DELAWARE
19899

DATED: JUNE 11, 1979

1. (a) REFERENCE TO UNREPORTED OPINION

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1. (b) CONSIDERATIONS GOVERNING

1. The lower court has decided this case not in accord with applicable decisions in this court, on questions of rights.

2. The lower court has rendered their decision in conflict with their lower court, as well as others and not applicable to decisions of this Court, which applies to Federal questions of rights.

3. The lower court has refused petitioners the right to obtain "discoveries".

4. Jury trial was denied by the lower court on fraud and deceit action, but allowed others, petitioners sought damages in court.

5. For the first time, this Court can decide a far reaching and important question of determining, whether, in this case and applicable to hundreds of corporate contracts, wherein the words, "subject to Board of Director approval", is no more than a collateral warranty, when prior delegation of authority has been given to company officers to complete contracts, as was in this case, and the callous refusal to comply with such discoveries, and the refusal of the

courts to order such discoveries, affected the rights under the Constitution.

6. Owing to departure from Federal Procedures by the lower court, this Court should exercise advisory supervision of this action.

1. (i) Judgment of the lower court affirming this decision of trial court:

Submitted November 27, 1978.

Decided December 18, 1978.

(ii) Petition for rehearing denied on January 12, 1979.

EXTENSION OF TIME GRANTED TO JUNE 11, 1979.

(iii) The Statutory Provision believed for leave to file Writ of Certiorari is based upon 28 USCA 1257, (15, 62, 107, 108, 109, 110, 194, 403), and this matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

1. (c) QUESTIONS PRESENTED FOR REVIEW

1. Discovery enjoined in civil litigation during concurrent action below, show discrimination and prejudice, and without regard to Federal and State Constitutions.

2. Discovery allowed others in prior civil action, below, and similar, and refusal of rights to petitioners shows discrimination and prejudice.

3. The lower court in prior actions ruled, whereby, in fraud and deceit actions should be tried by a jury,since

petitioners were denied a trial by jury of the merits and determination of the fraud and deceit issue, and such refusal showed prejudice and discrimination, and was without regard to Federal rights.

4. The lower court in not adhering to their state rules, pertaining to their right to review constitutional question, on procedural grounds, shows discrimination and infringement of the rights of petitioners.

5. The lower court in not following state rules, whereby, concealed fraud, arrests the statute of limitations, and without regard to petitioners rights.

6. The lower court, in reliance of a nonjurisdictional opinion of state equity court, fatally affected the petitioners' rights.

7. The lower court, in not relying on a later opinion of equity court that had jurisdiction, willfully affected the rights of petitioners.

8. The lower courts, decided in prior civil actions, where claim has been timely filed, (in this case praecipe was filed), that strict rules of procedures were not adhered to, yet in this action the opposite view was taken, even though petitioners were in compliance with Statute of Limitations and its "saving clause", thus, petitioners were discriminated against without regard to Federal claims.

1. (d) CONSTITUTION PROVISIONS INVOLVED

United States Constitution Amendment VII, civil trial

for fraud and damages. U. S. Code Annotated, Title 28, Judicial Procedure, Sec. 1257, State Courts, App. #12., 14th amendment, sec.1.

(15). Determination, at 156.

(62). Federal questions, at 182.

(107). Res judicata, at 220.

(108). Due process, page 220, 237.

(109). Jury trial, at 220.

(110). Burden of proof, at 220.

(194). Full faith and credit clause, 241.

(403). Denial of Federal rights, at 318.

Delaware Coue Annotated, Vol. 13, Chancery Court Rules, (App#13):

Rule 3, (a), (b), Rule 4, (a), Rule 12, (a), note 3, 59, (a). Rule

Delaware Code Annotated, Vol. 13, Supreme Court Rules (App. 14):

Rule 5, (7), note 3, note 4, note 14, note 17, Rule 14, (2).

10 Delaware Code 8106, Statute of Limitations.

10 Delaware Code 8118, Savings Clause.

10 Delaware Code 1901, Removal of actions.

1. (e), (f). STATEMENT OF THE CASE

Barrentine, (petitioner), entered suit against respondent in the court of chancery claiming fraud and deceit, seeking damages. That court, after declaring no contract had been entered into, stated, in addition, (App. 9), Page 3, last paragraphs:

> "***Insofar as plaintiff seeks damages sounding in tort, he has an adequate remedy at law.
> Defendant's motion to dismiss the complaint is hereby granted subject to the provisions of 10 Del. C., Sec. 1901."

Note, plaintiff by pleading and noting the reference to 10 Del. C. 1901, at page 6, of trial court docket entry #33 - the direct pleading is to "due course". The trial court at page 1, third paragraph of App. 3 , indicated collateral estoppel, not realizing chancery's opinion referred to aspects of the contract, but not to the legal claims sounding in tort. The lower court also ignored the right of legal action directed by the chancery decision (Barrentine action, 4461), App. 9 , also see App. #12, note 194. Petitioner followed Delaware procedurals, and was in compliance when pluries summons was accomplished. See T. C. docket entries #11 and complaint at #1.

During that chancery action, (Barrentine action), The Base Company, a former litigant of respondents, (4175), petitioned Vice Chancellor Marvel, a "Bill of Review", charging fraud and deceit in a prior action, which had been affirmed on appeal, adversely to Base. The defense, Indian Head, neglected to file a bill of exceptions; Base then filed a motion for default, for failure of respondent to defend. That motion also was not defended. The Vice Chancellor advised the Base Company, (DeMoss was president),

"***the case was closed***", and that the Delaware Supreme Court had affirmed. See App. #7. The courts below, in not giving full faith and credit to Chancery's decision, allowing legal action, was an abuse of the petitioner's Federal rights. See direct pleadings to "rights", T. C. docket entry #21, page 11, Arg. #5.1, under, 46 Am. Jur. 2d., Para. 610, at 769, both courts, noted before, still claimed collateral estoppel. See also App. 12, note 403 and note 194.

After an appeal on the Barrentine action, the petitioner, acting pro se, discovered the provisions of 10 Del. C. 1901, and the legal opportunity in the Superior Court. Petitioners joined forces and filed action in the trial court for fraud and deceit, (for description, see App. 15), filing letter of demand, complaint and praecipe, inadvertently leaving address of Indian Head off the praecipe.

Petitioners also made personal service on attorney who was defending the appeal, at that moment, to the lower court. The respondent failed to file a bill of exceptions or defend, the petitioners, thereafter, took default judgment on advice of the prothonotary that sheriff's service had been accomplished. The respondents had default judgment removed for lack of jurisdiction, while petitioners were out of state, and without adequate notice to petitioners (note - the similarity of failure to defend as in the chancery bill of review). Actual pluries service was finally accom-

plished on January 6, 1977, less than six months and in conformity with trial court rules. See T. C. docket entry #1 for complaint, and for pluries served, see T. C., D. E. #8. This was direct pleading of due course and equal rights also. See App. 12, note 107, 108.

The opinion of the trial court, App. 3 , at page 2, ignored the pluries summon, at paragraph 2,

> "***This action suffered immediately from plaintiffs' lack of knowledge of the procedural and substantive law.***"

The lower court opinion does not show or indicate the service or pluries summons, (App. 1). Chancery sent the records of the Barrentine action, (4461), to the lower court but did not include the May 22, 1976 letter re: Base. See App. 7 , and such opinions were not part of the records affirmed by the lower court on September 9, 1976. See App. 8# , for the actual decision affirmed. App. 9 shows affirmation). This lack of jurisdiction, noted at trial court, (D.E. #33, page 2). See App. #13, rule 59. The trial court treated the above May 22 opinion at App. #1, page 4, para. #3, as being litigated; this assumption of litigation, without joining of parties and lack of jurisdiction, materially affected petitioners' rights under 14th Amendment. The assumption of the lower court, in App. 1 , para. , (prior to (4)), that they had affirmed the June 14, 1976 letter was not true, falsely, and will fully affected the very rights of the plaintiffs below, and in the petition for reargument,

the error was pointed out, the lower court's answer was "not reversible error". (App. # 1, note (7). The respondents, not satisfied in having the default judgment removed, took civil action in the court of chancery, (Indian Head, Inc. v. Barrentine and DeMoss, see App. #11, for that attempt to prove collateral estoppel and res judicata, which failed. See page 1, second paragraph of rights, appendix no.11. See first instance of rights, at trial court D. E. #33, page 5, under res judicata. The lower courts both ignored that opinion of chancery, (App. 11), and at App. #1, para. (1), the lower court still decided that res judicata and collateral estoppel was applicable, even though the January 3, 1977 opinion, (App. #10), was the last opinion of chancery, and the fact that the vice chancellor had the June 14, 1976 letter opinion and the May 22, 1976 letter on file, and rendered the favorable opinion (11), and the courts' treatment of same affected the rights under the 14th Amendment, Sec. 1. See App.12 notes 62, 107, 108, 110, 194, 403, and see App. 14, rule 7, note 17.

Respondents in the trial court refused to honor request for important documents and refused interrogatories, which were in form of admissions; motion for compelling discoveries were stayed by the trial court. See App. #3, page 3, second para. The petitioners at trial court D. E. 2, 18, 24, requested dis-

coveries, and at D. E. #33, page 4, relating to "inherent rights". See also App. #12, note 110. The trial court's answer was, "***all the issues have been decided***". See second paragraph of App. #4. The petitioners requested a jury trial at trial court D. E. 21, and on petition for reargument, D. E. #33, this refusal of jury trial affected the rights under the 7th amendment and in conformity with prior decisions of the lower court on suits for fraud and negligence actions. Only after the trial court refused the trial of merits were these "rights" affected. In original appeal to the lower court, petitioners quoted the 7th, 9th and 14th amendments and elsewhere.

I. (h) ARGUMENT

(1-2) Respondent has consistently refused discoveries which reveal the items of fraud and deceit. See App. # 15for description of these items. The lower court, also, would not approve mandate for these discoveries, yet these discoveries were allowed others, and in one case, the lower court faulted litigant for not obtaining discoveries. See re:

Hicks v. Soroka, Del. Supre.,
188 A. 2d., at 136, note 1, (1963),

See also Societe Internationale v. Rogers, 78 S. Ct. 1087, (1958), at 212, regarding discoveries. See also , on question of fraud and discoveries, re:

Garcia v. Bernabe, U. S. Ct. Apps.
1st circ., 289 F. 2d 690 (1961), at 692.

(3). Even though the lower court was aware of request for jury trial, and ignoring the question of concealed fraud, and (still concealed), not recognizing these items, (including discoveries), were of a constitutional and of public policy, and necessarily affecting the appellants' right to a civil trial under the 7th amendment. The appellants were appalled at the lower court's opinion, stating "no reversible error". See App. #1, at page 3, (7).

(4). The petitioners pleaded in the trial court for a jury trial, discoveries, statute of limitations, (D. E. #21, at 15, last paragraph, savings clause, D. E. #28, item (C), and conformed to rules of procedure, by filing claim, praecipe, and pluries summons served within six months, in accordance with rules of court, including pleadings to "rights", and Constitutional amendments in the lower court. See in re:

Mundy v. Holden, Del Supre. Ct.,
204 A 2d 83, (1964),

regarding speedy end to litigation, (note, since fraud is still concealed), included in that citation was reference to Kerbs v. California Eastern Airways, Del. Supre. 90 A 2d 652, (1952), referencing rule 7, note 14, see App.14 , also #5. rule

(5). The original action, Base v. Indian, C. A. 4175, Del. Ch., (1973), was on contract performance, fraud was not pleaded, nor did the attorney for Base have the special expertise to discover fraud although he

used "due diligence", in attempting to have Indian Head conform to Condition Precedent, Chancery Rule 9 (c), regarding, and Base stating that prior delegation of authority had been given to the company's officers, and obtaining copy of previous board meeting where such approval was delegated, but Vice Chancellor overruled the request that Indian Head comply with Rule 9 (c). Affidavits were presented by the defense to the effect that board approval was required. See App. 5 , page 3, 2nd and last paragraph, but note the rejection of due diligence of Base's attorney and, further, no amount of diligence would have discovered that Indian Head had agreed to sell to others while having a contract with Base, but held, or delayed notifying Base until damages had occurred, deliberately, and willfully concealed that knowledge of the pending contract cancella ion, although in daily contact with petitioners, for the reason they (Indian Head) were not sure the new contracted party could raise the capital required, as once before, that same group attempted to buy certain marginal assets from Indian Head, but could not raise the money required. If that group had been unable to raise the capital, the question arises, would they, (Indian Head) have sold to Base, whereby, they had a signed preliminary contract, and also a more formal contract with seal affixed and signed by Base. Is it no wonder the refusal of respondents to comply with discoveries, which would reveal

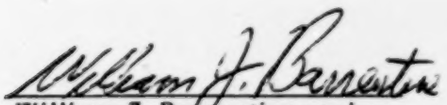
the entire story of fraud and deceit affecting Barrentine and DeMoss who resigned prior executive positions, based upon words and deeds of respondents who willfully concealed impending contract termination. Note: this question is a national one of corporate strategy and potentially fraudulent and should be reviewed by this Court.

(6-7). The courts below selected one of several opinions of the court of Chancery and the June 14, 1976 opinion selected lacked jurisdiction for the following reasons: first, it was noted previously that Chancery cannot pass judgment on any case that has been appealed; (App. 13 , rule 59); second, there was no joining of the parties, the defendant in that case ignored the petition for review; third, rules of chancery were ignored by that petition for Bill of Review. There was no complaint, no praecipe, no deposit for costs, no setting of schedules of briefs, no arguments at any hearing or trial, just the letter stating the case was closed, and the unusual turn-up of the third opinion on C. A. 4175, which was never sent to the lower court by the court of chancery. Petitioner suggested that unusual opinion should have been investigated, but was ignored by the lower court, even the argument date shown was wrong; the actual date of argument was on March 30, 1976.

i. COMPANION CASES - unreported

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted in order that petitioners may have their day in court.



William J. Barrentine and
Richard F. DeMoss
Joint Tenants in Common
or Survivor
Petitioners

cc: W. L. Pepperman, II, Esq. (3)

Dated: June 11, 1979

78-1899

IN THE SUPREME COURT OF UNITED STATES

APPENDIX TO PETITIONERS" PETITION FOR WRIT OF CERTIORARI AND LEAVE TO FILE (PRELIMINARY)

PETITIONERS v. INDIAN HEAD, INC.

RICHARD F. DE MOSS AND
WILLIAM J. BARRENTINE
JOINT TENANTS IN COMMON
OR SURVIVOR

CONTENTS

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. DEMOSS and
WILLIAM J. BARRENTINE,
Joint Tenants in Common or Survivor,

Appellants, v. Indian Head, Inc, et. al.,
Appellees.
No. 275, 1977
Submitted: November 27, 1978
Decided : December 18, 1978

Before HERRMANN, DUFFY and HORSEY,

Appeal from the Superior Court, Denying Jury trial on Fraud and Deceit, and denial of plaintiff rights of obtaining Discoveries, also, for allowing a non-jurisdictional opinion of chancery to stand.

Opinion by Horsey

This 18th day of December, 1978,

Upon consideration of the briefs submitted by the parties and oral argument before the Court on November 27, 1978, it appears to the Court that:

(1) This action is before this Court on appeal by plaintiffs from an order of the Superior Court dated September 8, 1977, dismission the Complaint on the ground that the subject matter of this action is barred by principles of res judicata and collateral estoppel and by the statute of limitations, 10 Del. C. §8106.

(2) The subject matter is the same as that in two prior actions brought by plaintiffs against the same defendant in the Court of Chancery: The Base Co., Inc., et al. v. Indian Head, Inc., Civiil Action No. 4175, in which DeMoss was a plaintiff hearafter referred to as the "1973 suit"), and Barrentine v. Indian Head, Inc., Civil Action No. 4461, in which DeMoss participated through the filing of a "Bill for Review", (hereafter referred to as the "1974 suit").

(3) In the 1973 suit, the Court of Chancery, by opinion and order dated November 26, 1973, held for defendent, Indian Head, finding that no contract came into being or existed between Base and Indian Head for which relief could be granted. That decision was affirmed by this Court by order dated October 18, 1974. See 344 A.2d 384 (1974). In the 1974 suit, the Court of Chancery dismissed the action brought by Barrentine by opinion and order dated May 21, 1976; the Court ruled that Barrentine's suit was barred by principles of collateral estoppel by reason the 1973 suit and its dismissal. However in the

Barrentine action, papers were filed on behalf of DeMoss titled, "Bill for Review", claiming that Indian Head had committed fraud in connection with socalled advance ratification of corporate contracts . . . ", even if they were taken to be true. Plaintiff appealed and this Court again affirmed by order dated August 20, 1976. See 365 A.2d 136 (1976).

(4) This action (hereafter referred to as the "1976 suit") was brought in the Superior Court by both DeMoss and Barrentine against the same defendant, Indian Head. The Court found this action to be based on the same transaction and subject matter as the two prior actions. A claim of fraud was again made, namely that Indian Head had committed fraud on the Court of Chancery in contending that the alleged contract required approval of its Board of Directors when the Board had delegated its authority to contract so as not to require Director approval. In its opinion, the Superior Court found (1) that the question of fraud had been raised and disposed of in the 1974 suit in the "Bill for Review"; (2) that the alleged fraud, " . . . even if proven, . . . would not constitute a course of conduct [by] defendant which would amount to fraud"; and (3) that there was no evidence of concealment or fraudulent conduct by defendent in connection with the negotiations with plaintiffs or third parties concerning the proposed sale of assets.

(5) In summary, the Court found (1) that any claim by DeMoss was barred by principles of res judicata; (2) that any claim by Barrentine was barred by principles of collateral estoppel, there being privity of interest between thenselves and Base; and (3) that apart from the foregoing, the suit was barred by the limitation of 10 Del. C. §8106, all causes of action having accrued more than three years before the filing of the suit and not tolled,

(6) Plaintiffs' remaining claims argued on appeal should be dismissed under former Rule 5 (7) as not timely raised and argued in the Court below

(7) There is no reversible error.

NOW, THEREFORE, IT IS ORDERED That the judgment of the Superior Court be and it is hereby

AFFIRMED.

BY THE COURT:

(Signed) Homer R. Horsey,
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE .

DEMOSS vs. INDIAN HEAD

No. 275, 1977
C.A. 868, 1976

DENIAL OF REARGUMENT

1979, January 12.

Received and filed memo dated January 12, 1979 by Justice Horsey, denying motion for re-argument.

(Signed) R. Townsend

OPINION OF SUPERIOR COURT OF THE STATE OF DELAWARE

RE: DeMoss, et al v. Indian Head Inc., et al 868 Civil Action, 1976, Document Nos.

Submitted: July 25, 1977

Decided : September 8, 1977

The purpose of this letter is to give the decision of the Court on the plaintiffs' motion to remove the attorney of record and the defendant's motion to dismiss the plaintiffs' complaint.

The original action in this continuing litigation was The Base Company, Inc., et al v. Indian Head, Inc., Chancery, C.A. 4175, aff'd without an opinion Del. Supr. 344 A.2d 384 (October 18, 1974). In this action, the plaintiffs Base and DeMoss sought specific performance of an alleged purchase and sale of corporate assets between the plaintiffs and the defendant.

On March 15, 1974, plaintiff Barrentine brought suit against the defendant in the Court of Chancery seeking specific performance and damages resulting fromthe defendant's failure to perform the alleged Base and Indian Head contract. Barrentine v. Indian Head, Inc., Chancery, C.A. 4461, aff'd without an opinion Del. Supr. 365 A.2d 136 (1976). Chancellor

Marvel ruled that the plaintiff was barred by the principles of collateral estoppel in light of the disposition of the earlier litigation.

During the Barrentine suit, plaintiff DeMoss filed what he termed a "Bill for Review" of C. A. No. 4175. The plaintiff alleged therein that Indian Head commonly dispensed with formal Board approval of corporate contracts by delegating such authority in advance. The Court held that the plaintiff could have advanced and litigated this theory at the trial level and his failure to do so was not excusable neglect or attributable to newly discovered evidence. The "Bill for Review," treated as a motion under Rule 60 (c), (1), (2) and (3), was dismissed.

The present action was initiated on July 21, 1976, by the plaintiffs Barrentine and DeMoss appearing pro se. This action suffered immediately from plaintiffs' lack of knowledge of the procedural and substantive law. The plaintiffs' misunderstood the requirements of service of process. Service was directed to the defendantin care of its attorney, Walter L. Pepperman, II, Esquire, at the latter's Wilmington office. Mr. Pepperman refused to accept service alleging that he was not authorized under the provisions of Rule 4 (f) (1) (III). It is clear that he was not, in fact, an authorized agent to receive service.

Several attempts to serve the complaint upon Mr. Pepperman met with his continuing refusal to accept service.

On September 25, 1976, the plaintiffs directed the entry of a default judgment in the amount of $1,503,504.76 against the defendant for failure to answer the complaint even though service had not been had. Be error, judgment was entered. Mr. Pepperman, by letter of September 29, 1976, apparently unaware that a default judgment had been entered, advised plaintiff DeMoss that Indian Head, Inc. had not been served with process and, therefore, he had no authority to communicate with the plaintiff on behalf of Indian Head. This letter is the basis of plaintiffs' motion to remove defendant's attorney.

Thereafter, on October 15, 1976, the defendant, through its attorney Walter L. Pepperman, moved to vacate the default judgment on the ground that the defendant had never been served with process. Judge George R. Wright of the Superior Court entered an order granting the motion.

Subsequently, on December 28, 1976, another summons was issued properly addressed to the defendant's registered agent, Corporation Trust Company, 100 West 10th Street, Room 1210, Wilmington, DE 19801. This summons was finally served on January 6, 1977.

On January 13, 1977, plaintiffs filed, in this Court, a motion to remove defendant's attorney. Shortly thereafter, on January 26, 1977, defendant timely served and filed a motion to dismiss the complaint under Rule 12 (b) (6) on the ground that plaintiffs' claim was barred by the statute of limitations and by principles of res judicata and collateral estoppel.

Interrogatories served upon the defendant were stayed by my order of February 24, 1976, pending resolution of the then pending motions.

* * * *

The Court finds that the motion to remove the defendant's attorney is without merit and that motion is hereby denied.

The crux of the matter is the plaintiffs' misunderstanding of the procedure involved. Service of process upon a domestic corporation comes within the provisions of Rule 4 (f) (1) (III) and is accomplished by delivering the papers " . . . to an officer, a managing or general agent or to any other agent authorized by law to receive service of process . . . " The facts clearly indicate that Mr. Pepperman was not authorized was not authorized to accept service of process and that attempts to serve him were of no effect.

The letter of September 29, 1976, from Walter Pepperman to Richard DeMoss, upon which the plaintiffs so heavily rely, states in its pertinent part, "Indian Head, Inc., has not been served with process in any such action therefore, I have no authority further to communicate with you on behalf of Indian Head, Inc." This sentence is not ambiguous and merely states that since process was not served on Indian Head that he, Walter Pepperman, had no authority for further communication with the plaintiffs on that matter. The plaintiffs' attempts to take the second half of the sentence and to construe it out of context are misdirected. It is evident that Mr. Pepperman was not denying that he was the defendant's attorney. A review of the entire record reveals absolutely no grounds to support the motion to remove the defendant's attorney.

* * * *

Defendant's motion to dismiss the plaintiffs' complaint is granted.

The gravemen of the plaintiffs' complain t is that the defendant breached the alleged Base and Indian Head contract and that the defendant committed fraud upon the Court of Chancery by stating that the alleged contract required board of director approval. These are the matters which were raised, and disposed of, in the earlier litigation between the parties.

In the matter of The Base Co., Inc. et al v. Indian Head, Inc., Chancery C. A. No. 4175, (unreported decision dated November 26, 1973) Chancellor Marvel held that there was no contract between Base and Indian Head. " . . . I conclude that a contract between plaintiffs and Indian Head for the sale of the Wilmington Finishing Division of Joseph Bancroft & Sons Company does not exist and the fact that plaintiffs undoubtedly incurred expenses looking towards the execution of an enforceable contract does not alter the fact that negotiations came to naught and a contract did not come into being." Since the Court of Chancery has found that no contract exists and that decision has been affirmed by the Supreme Court, the issue is no longer open to question. The matter has already been clearly resolved adversely to the plaintiffs Base and DeMoss.

Subsequent thereto, plaintiff Barrentine Brought an action against the same defendant based on the same alleged contract. Barrentine v. Indian Head, Chancery, C.A. 4461, aff'd Del. Supr. 365 A.2d 136 (1976). Chancellor Marvel, applying the principles ofcollateral estoppel to the plaintiffs' complaint, held that it was barred by the disposition of the earlier litigation brought on behalf of Base and DeMoss against Indian Head in Chancery C.A. 4175 (unreported decision dated May 21, 1976).

In the aforementioned "Bill for Review", plaintiff DeMoss raised the question of fraud by the defendant on the latter's assertion that Board of Director approval was required for the alleged contract. Chancellor Marvel held (in an unreported decision dated June 10, 1976), and I agree, that such a contention is a matter which could have been directly raised at the trial level. Further, the plaintiffs' allegations, even if proven, would not constitute a course of conduct on the part of the defendant which would amount to fraud. Plaintiffs indiscriminately use the word "fraud" in connection with the defendant actively concealed or attempted to conceal anything concerning prior director approval. Also, there was nothing fraudulent about contemporaneous negotiations with other possible purchasers of the Wilmington Finishing Division.

Accordingly, as to plaintiff DeMoss, the doctrine of res judicata applies to all matters which were raised or might have been raised in the prior litigation. The judgment in the prior suit involving plaintiff DeMoss bars this second suit based on the same cause of action. Foltz v. Pullman, Incorporated, Del. Super. 319 A.2d 38 *1974). As to plaintiff Barrentine, collateral estoppel applies as to the issue which was actually litigated, the existence of the contract.

This precludes further litigation of that issue. Foltz v. Pullman, Incorporated, supra.

* * * *

As a further basis for this decision, I find that the action is barred by the applicable statute of limitations.

It is clear that the statute to be applied is 10 Del. C. §8106 which states in its pertinent part " . . . no action to recover damages caused by an injury unaccompanied with force . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . " The defendant alleges, and I so find, that the last date any injury could have been caused by the defendant's actions was March 27, 1973, the date of the Board of Director's rejection of the proposed contract. Having previously determined that there were no actions by the defendant amount to fraudulent concealment which would be sufficient to toll the statute of limitations, the cause of action accrued no later than March 27, 1973. This action which was commenced on July 21, 1977, is, therefore, barred.

* * * *

The plaintiffs' motion to remove the defendant's attorney is denied. The defendant's motion is to dismiss the complain is granted. IT IS SO ORDERED.

Very truly yours,
Andrew D. Christie

SUPERIOR COURT OF THE STATE OF DELAWARE
DENIAL OF REARGUMENT

RE: DeMoss, et al v. Indian Head Inc.,
et al 868 Civil Action, 1976

I acknowledge receipt of a motion for reargument in the above case which motion was filed September 12, 1977. I also received a short letter from Mr. Barrentine dated September 13, 1977, in connection with the motion and a letter from Mr. Pepperman dated September 19, 1977.

I have reviewed the opinion letter, the motion and the letters in regard to the motion. I find that all the issues have been decided and nothing said in any of the papers gives me any reason to change the decision of the Court. Further argument would not be helpful.

The motion for reargument is denied. IT IS SO ORDED.

Very truly yours,

Andrew D. Cristie

COURT OF CHANCERY OF THE STATE OF DELAWARE

November 26, 1973
Re: The Base Company, Inc. v. Indian Head, Inc.,
C. A. No. 4175

This action seeks specific performance of an alleged contract of purchase and sale of corporate assets entered into between plaintiffs as buyers and the corporate defendant Indian Head, Inc. as seller, which alleged contract, it is claimed, provided for the sale of the Wilmington Finishing Division of the defendant Joseph Bancroft & Sons Company, a wholelyowned subsidiary of the defendant Indian Head, to a corporation to be organized by plaintiffs.

The complaint alleges that in January, 1973, the plaintiff DeMoss entered into negotiations with defendant Indian Head, Inc., looking towards purchase of the Wilmington Finishing Division to a corporation to be organized by plaintiffs and that such negotiations culminated in the making of an enforceable agreement in principle providing for the purchase and sale of the property in issue, said preliminary agreement having been allegedly reached by the parties in interest on March 1, 1973. Said alleged agreement, provided, however, that: "This agreement in principle shall be subject to the approval of the Board of Directors of Indian Head, Inc."

Alternatively, plaintiffs seek damages in excess of $1,000,000, allegedly sustained by them as a result of defendants' alleged breach of contract.

Plaintiffs claim that as of March 1, 1973, Indian Head, Inc. had completed all steps required by it to insure consummation of the proposed sale to plaintiffs of the Wilmington Finishing Division of Bancroft & Sons, and that the only acts thereafter remaining to be performed by either side to this litigation had to do with undertakings on the part of the plaintiff DeMoss, the president of The Base Company, concerned with the financing of the transaction in issue and the formation of a purchasing corporation.

The so-called letter of intent dated March 1, 1973, as well as alleged contemporaneous verbal understandings between the parties, on which plaintiffs rely for the relief sought by them, contemplated a closing date of on or about March 26,1973. Looking towards such contemplated closing, Indian Head, on March 5, 1973, forwarded to plaintiffs a proposed draft form of contract providing for the sale of the Wilmington Finishing Division of Bancraft & Sons to plaintiffs with instructions that a copy of the forwarding letter be executed and returned by March 12. Such draft, which was marked as such, contained some blank spaces and was never executed by Indian Head.

The covering letter which forwarded such draft referred to such enclosure as a "*** proposed form of Purchase Agreement." However, such draft was executed by the plaintiff corporation and was returned to defendant on March 12,. Later that same day Mr. DeMoss was informed by Indian Head that the purchase and sale negotiations concerning the Wilmington Finishing Division were being terminated, and on March 27, one day after the anticipated closing date, the board of directors of Indian Head formally rejected plaintiffs' offer to buy Bancroft & Sons, having been informed by management personnel of the Wilmington Finishing Division that they would not work for the plaintiff DeMoss, telephonic information asto such position having been conveyed to Mr. DeMoss on March 12.

This is the decision of the Court on defendants' motion for summary judgment dismissing the complaint, a motion which is based on the theory that plaintiffs' action must fail because the proposed buyer and seller failed to reach agreement on the terms of an enforceable contract, a condition precedent to a firm contract being, as noted above, its approval by the board of directors of Indian Head. Plaintiffs, on the other hand, contend that a question of fact exists as to whether or not Indian Head's board of directors actually approved the form of contract on

which plaintiffs rely and that this case cannot be properly decided short of trial.

In the case of H and S Manufacturing Company v. Benjamin F. Rich Company, 39 Del. Ch. 380, 164 A.2d 447 it was held that where summary judgment is sought, the moving party has the burden of clearly demonstrating the absence of any genuine factual issue. Compare Warshaw v. Calhoun, 42 Del. Ch. 437, 213 A.2d 539, aff'd Del. Supr. 221 A.2d 487, and Nash v. Connell, 34 Del. Ch. 20, 99 A.2d 242. Accordingly, while a pary moving for summary judgment must normally carry the burden of demonstrating the absence of a material dispute of fact, in a situation in which the opposing party fails to produce any opposing evidence, wuch burden is deemed carried, Berwald v. Mission Development Company, 40 Del. Ch. 509, 185 A.2d 480.

Plaintiffs, in seeking to raise a material factual issue, contend that paragraph 8 (d) *1 of the March 5 draft of agreement, which was prepared by defendants, should be construed to be an offer to sell, which was accepted when the plaintiff DeMoss executed such instrument. A reading of the instrument, however, persuades me to the contrary. Paragraph 8 (d) of the March 5 draft, in my opinion, clearly refers to the future and was to become

effective only after formal approval to the proposed sale had been given by the board of directors of Indian Head. (See par. 8 (c) of same draft which provides that: "The execution and carrying out of this Agreement and compliance with the provisions hereof by Seller will not violate any provision of law.***")

Having found no material facts at odds with the unambiguous written provision of the original letter of intent *2 that a firm contract was not to come into being between the bargaining parties until approval by the board of directors of Indian Head, which not granted, I conclude that a contract between plaintiffs and Indian Head for the sale of the Wilmington Finishing Division of Joseph Bancroft & Sons Company does not exist and the fact that plaintiffs undoubtedly incurred expenses looking towards the execution of an enforceable contract does not alter the fact that negotiations came to naught and a contract did not come into being. Having reached such conclusion, it will be unnecessary to decide whether or not specific performance is an appropriate remedy for the relief sought by plaintiffs.

Defendants' motion for summary judgment of dismissal of the complaint will be granted, and , on notice, an appropriate order may be submitted.

*1

"8 (d) The execution, delivery and performance of this Agreement on the part of Seller has been duly authorized by all necessary corporation action."

*2

"Whether or not a letter of intent may constitute a binding agreement depends upon the intend of the parties as disclosed by the facts and circumstances" Itek Corporation v. Chicago Aerial Industries, Inc. (Del. Supr.) 274 A.2d 141.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BASE COMPANY, INC. a
Delaware corporation, and
RICHARD F. DeMOSS,
Plaintiffs Below, Appellants,

vs.

INDIAN HEAD, INC., a
Delaware corporation, and
JOSEPH BANCROFT AND SONS
COMPANY, a Delaware corporation,
Defendants Below, Appellees.

No. 2, 1974
Submitted: September 25, 1974
Decided : October 18, 1974

AFFIRMING ORDER

AND NOW, to-wit, this 18th day of October, 1974, upon due consideration of the contentions of the parties,

It Appearing to the Court:

(1) That the Court of Chancery granted summary judgment in favor of the defendants, for the reasons set forth in letter opinion dated November 26, 1973; and

(2) That this Court is in agreement with the conclusions and decision set forth in the said letter opinion:; and

(3) That there is no genuine issue as to any material fact, reflected in the record of this case, and that the defendants are entitled to judgment as a matter of law, as was determined by the Chancery Court; and

(4) An opinion in this case would have no precedential value,

NOW, THEREFORE, IT IS ORDERED That the judgment below be and it is hereby

AFFIRMED.

(Signed) Herman

(Signed) Duffy

(Signed) McNeill

Court of Chancery of the
State of Delaware
March 22, 1976
Letter Opinion
Re: The Base Company, et al v. Indian Head,
C.A. Nos. 4175 and 4461

Dear Mr. DeMoss:

I have reviewed the pleading files in the above two cases in connection with your pending motion for review and find that judgment in case No. 4175 was affirmed by the Supreme Court of the State of Delaware in January, 1974, and the case closed.

As far as C. A. No. 4461 is concerned, this case has been assigned to Vice Chancellor Brown and any application you have in the matter should be addressed to him.

Very truly your,

Vice Chancellor
William Marvel

Court of Chancery of the
State of Delaware
May 21, 1976
Opinion

Re: Barrentine v. Indian Head, C. A. 4461,
Submitted: April 6, 1976

Plaintiff seeks an order of this Court directing the specific performance of an employment contract allegedly entered into between him as a prospective employee and The Base Company as his employer to be in March 1973, in reliance on which plaintiff incurred substantial expenses having drastically changed his position because of the expectations flowing from the imminent consummation of such alleged employment contract upon the expected acquisition of assets of Indian Head by The Base Company. Also sought are damages allegedly sustained by plaintiff as a result of not being employed as expected.

Assuming that the type of contract here involved is susceptible of being enforced by a decree of specific performance despirte its being one for personal services, a type of contract this Court is not normally competent to enforce because of its very nature, I am satisfied that the coming into being of the contract plaintiff seeks to have specifically

enforced was dependent on the successful acquisition by The Base Company of assets of the defendant Indian Head, a claim which was litigated to final judgment in C. A. 4175 with results adverse to the contentions made by The Base Company.

In the cited case in this Court, in finding that an auctionable contract between The Base Company and Indian Head had never come into being stated:

> "Looking towards such contemplated closing; Indian Head, on March 5, 1973, forwarded to plaintiffs a proposed draft form of contract providing for the sale of the Wilmington Finishing Division of Bancroft & Sons to plaintiff with instructions that a copy of the forwarding letter be executed and returned by March 12. Such draft, which was marked as such contained some blank spaces and was never executed by Indian Head.
>
> *****
>
> "Having found no material facts at odds with the unambiguous written provision of the original

> letter of intent that a firm contract was not to come into being between the bargaining parties until approval by the board of directors of Indian Head, which was not granted. I conclude that a contract between plaintiffs and Indian Head for the sale of the Wilmington Finishing Division of Joseph Bancroft & Sons Company does not exist and the fact that plaintiffs undoubtedly incurred expenses looking towards the execution of an enforceable contract does not alter the fact that negotiations came to naught and a contract did not come into being."

Applying principles of collateral estoppel to plaintiff's complaint here, I have no doubt but that plaintiff's claim is barred in light of the final disposal of the earlier litigation brought on behalf of The Base Company, against Indian Head in C. A. 4175. Insofar as plaintiff seeks damages sounding in tort, he has an adequate remedy at law.

Defendant's motion to dismiss the complaint herein is hereby granted subject to the provision of 10 Del. C. §1901.

It is SO ORDERED this 21st day of May, 1976.

(Signed) William Marvel
Vice Chancellor

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM J. BARRENTINE,
Plaintiff Below,
Appellant,

v.

INDIAN HEAD, INC., a Delaware corporation
Defendant Below,
Appellee.

No. 156, 1976
Submitted: July 19, 1976
Decided : August20, 1976
AFFIRMING ORDER

This 20th day of August 1976,

It appears to the Court that:

(1) In this action for specific performance of an employment contract the Court of Chancery granted defendant's motion to idsmiss the complaint;

(2) Pursuant to the provisions of Rule 8 (2) defendant has moved to affirm the judgment of the Trial Court;

(3) It is manifest on the face of plaintiff's brief that the appeal is without merit because the issue on appeal is clearly controlled by settled Delaware law and the case of Base Company, Inc. v. Indian Head, Inc., Del. Supr., 344 A.2d 384 (1974).

NOW, THEREFORE, IT IS ORDERED That the judgment below be and it is hereby

AFFIRMED.

BY THE COURT:

(Signed) Duffy
Justice

COURT OF CHANCERY OF THE
STATE OF DELAWARE
January 3, 1977
OPINION

Re: Indian Head v. DeMoss, et al., C.A. 5208,
Submitted: November 30, 1976

I have considered plaintiff's motion for injunctive relief against Mr. Barrentine's prosecution of a related suit in the Superior Court of the State of Delaware in and for New Castle County, against Indian Head, Inc. and am of the opinion that such motion shoudl not be granted at the present time inasmuch as the Barrentine action in Superior Court is allegedly based on the law of deceit, while the original Chancery litigation was concerned with an alleged contract between Mr. DeMoss and Indian Head, Inc. in which Mr. Barrentine claimed a beneficial interest.

In short, a court of equity should be hesitant to enjoin a party from prosecuting litigation pending in a sister court under any circumstance and here plaintiff apparently relies on a different theory for recovery than that relied on in this Court and in the Delaware Supreme Court.

However, unless the Superior Court action is stayed or otherwise disposed of in the meantime, Indian Head may renew its motion for injunctive relief against alleged repetitive and harrassing litigation being prosecuted by Mr. Barrentine in Superior Court on or after June 30, 1977.

IT IS SO ORDER this3rd day of January, 1977.

(Signed) William Marvel,
Chancellor

28 U.S.C.A. 1257

Note 15, Page 156 - "The United States Supreme Court is the final authority as to what constitutes a federal question. Beckman Lumber Co. v. Acme Harvester Co., 1908, 114 S.W. 1087, 215 Mo. 221"

Note 62, Page 182 - "Every question arising under the Federal Constitution may, of properly raised in a state court, come ultimately to the U.S.S.Ct. for decision. Hague v. Committee for Industrial Organization, N.J. 1939, 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423

Note 107, Page 220 - "A decision of a state court disposing of a federal question by following its decision on a former appeal as the law of the case, cannot be regarded as resting on the independent, non federal ground of res judicata. South. R. Co. v. Clift, In. 1922, 43 S. et, 126, 260 U.S. 316, 67 L.Ed. 283"

Note 109, Jury Trial, Page 220 - Local rule applicable.

Note 108, Due Process, Page 220 - "Claimed non-federal ground of Ala. S. Ct. decision barring assoc. from doing business in Alabama based upon asserted failure of aggoc.'s brief on appeal to conform to Ala. Ct. rules was inadequate to have review by U.S.S.Ct. of Const. claims presented by assoc., where assoc. substantially complied with proced. rules both in substance and form."

Note 110, Burden of Proof, Page 220 - "A question of burden of proof may amount to a federal question when intimately involving substantive rights under a federal stahite, Hill v. Smith, Mass. 1923, 43 S. Ct. 219, 2L0 U.S. 592, 67 L.Ed. 419"

Note 194. Full Faith and Credit Clause, Page 241 - Where procedural rules are followed, parament to Del. Statutes and Codes.

Note 403, Denial of Federal Rights, Page 318 - " Supreme Ct. may inquire whether decision of State Ct. denying constitutional protection to rights asserted under local law,though on non federal grounds., rests on fair or substantial basis. Demorest v. City Bank Farmers Trust Co., N.Y., 1944, 64 S.Ct. 384, 321 U.S. 36, 88 L.Ed. 526."

Delaware Code Annotated, Vol. 13, Chancery Court Rules

Rule 3 (a) at Page 140 - "Complaint. An action is commenced by filing with the Register in Chancery."

Rule 3 (b) Deposit for Cost. Page 140 - "The Register in Chancery will not file any paper or record or docket any proceeding until a deposit for fees and costs has been made with him."

Rule 4 (a) Summons; Issuance. Page 143 - "Upon the commencement of an action, the Register in Chancery shall forthwith issue summons and deliver it for service to the sherriff."

Rule 12 (a) Defenses and Objections, When and How Presented - When Presented, Page 167 -A defendant shall serve his answer within 20 days after the service."

Note (3), at 170 - "Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Rule 59, New Trials, Page 283

(a) Grounds. "A new trial may be granted to all or any of the parties, and on all or part of the issues for any of the reasons for which rehearing have heretofore been granted in suits at equity. The court may open judgment if one has been entered, take additional testimony, amend or make new factual findings and legal conclusions, and direct the entry of a new judgment. A new trial will not be granted after the filing of an appeal."

Delaware Code Annotated, Vol. 13, Supreme Court Rules

Rule 5, Note (3) - Questions not previously raised-generally at 26, - "The Supreme Ct. will not permit a litigant to raise in the Supreme Ct. for the first time maffas not argued below, where to do so would be to raise an entirely new theory of the case, but when the argument is merely an additional reason in support of the proposition urged below, there is no acceptable reason why, in the interest of a speedy end to litigation, the argument should not be considered on appeal."

Note 4 - at 27, questions of jurisdiction, legality or public policy - "Ordinarily, appellate court will not consider questions which have not been fairly presented below except when question is one of jurisdiction of subject matter, or when question of public policy is involved. Id."

Rule 7 (1) Records on Appeal Page 29 - "Appeals in all causes shall be heard on the original papers and exhibits, which shall constitute the record on appeal."

Note (4) Record Generally, at 32 - Cases in Supreme Court are not heard upon an abstract but upon the original papers sent up from the lower ct. Mahen v. Voss 98 A.2d 499 (1953)."

Note (14) Questions Considered, at 35 - "The appellate et. can consider nothing that is not continued in the record, and will not pass upon a question not raised by the record. Layton v. Trustees of Poor of Sussex County, 6 Houston 13, 11 Del. 13 (1880)"

Note (17) Evidence at 35 - "Where the evidence taken was not made part of the record by bill of exceptions in accordance with the statutes and rules, the evidence was not before the S. Ct. on error proceedings. Stidham v. Brooks, Terry 110, 40 Del. 110, 5 A2d 522 (1939)"

Rule 14 Mondate - Special form, (2), at 44 - In any cause in which a special form of mandate, judgment, decree, or process may be required, the Ct. may, upon application of consel filed prior to the time fixed for the issuance of the mandate, on you its own motion, permit caused to be heafd upon the form thereof."